In Re Holocaust Victim Assets Litigation regarding the Application of Bu...uborne for counsel fees Doc. 17

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE HOLOCAUST VICTIM ASSETS LITIGATION	**Master Docket No. CV-96-4849 (ERK) (MDG)**

MEMORANDUM OF LAW OF THE SETTLEMENT CLASS IN OPPOSITION TO THE APPLICATION OF LEAD SETTLEMENT COUNSEL FOR COUNSEL FEES

The strident response of Mr. Neuborne to the Class' opposition[1] to his Application for $4 million in fees for post-settlement work loses sight of the issues. His Fee Application is **not** about:

- Whether Mr. Neuborne is brilliant
- Whether some counsel are dissatisfied with this Court's rulings
- Whether the plan of allocation of *cy pres* monies is fair

Very simply, what is at issue is the integrity of the Fee Application.

I. Preservation of Issues Raised Previously

The Class preserves issues presented to the Court in letters to the Court dated February 9 and 15, 2006 including:

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[1] The Objections were filed by Settlement Class Counsel on behalf of the Class as a whole, not Mr. Swift personally as incorrectly suggested by Mr. Neuborne. Mr. Swift has no personal or financial interest in this matter and is acting *pro bono*.

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- A request that the Court require all post-settlement fee applications to be filed at this time
- A request that Class Notice be issued pursuant to Rule 23(h)(1) regarding the fee applications
- A request that the Court electronically file all comments it has received regarding the Fee Application

II. Counsel Who Represented Himself as Acting *Pro Bono* and Failed to Disclose a Secret Agreement With the Court for Compensation Is Not Entitled to Compensation

Counsel for Schaecter *et al.* has demonstrated that on numerous occasions after February 1999 Mr. Neuborne represented in writing that he was acting *pro bono* for the class and not distinguishing, as he does now, between his pre-settlement time and post-settlement time. Having reaped accolades for serving *pro bono*, it now appears the writings were not truthful and his *pro bono* service after January 1999 was an illusion.

Mr. Neuborne also claims that the Court drafted him, over his opposition, as Settlement Lead Counsel with a promise of compensation.[2] If compensation was agreed upon -- and Mr. Neuborne has offered no documentation for it – there was a duty of disclosure to all Class Counsel and the Class. *See* NY Lawyer's Code of Prof. Responsibility at Canon 2-19; NY Disciplinary Rule 2-106. At the very least, notice thereof should have been filed in the docket.[3] More importantly, this information should have been contained in the initial class notice. If the Court was party to the arrangement, the Court should have insisted upon such disclosure or entered an Order.

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[2] Mr. Neuborne suggests in his memorandum that he was indispensable to obtaining approval of the settlement and allocation. The short answer is to repeat the aphorism that cemeteries are full of indispensable people. The longer answer is that, for less than $700 per hour, the Court could have engaged any number of

The fact that some of Mr. Neuborne's friends among Class Counsel are not surprised that he is seeking a fee for post-settlement work does not discharge Mr. Neuborne's obligation of disclosure. None of these friends assert knowledge of Mr. Neuborne's alleged arrangement with the Court. It is noteworthy that none of these lawyers dispute that, as the Court itself found, there were other well-qualified lawyers willing to work *pro bono*. Instead of tapping that source for the bulk of the post-settlement work, Mr. Neuborne monopolized the work knowing – but not disclosing -- he would seek a fee.

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talented New York City attorneys who would have served the Class faithfully and obtained at least the same results.

[3] In his defense, Mr. Neuborne claims that he mentioned he would seek fees in a footnote in his law review article published by a third tier law school in 2003. A buried footnote in a lengthy law review article in an obscure law review is hardly the type of notice appropriate to overcome his other public assertions.

III. The Fees Sought Are Excessive

A. An Hourly Rate of $700 Is Not Justified

In response to the Class' objection that $700 per hour would be an excessive rate of compensation, Mr. Neuborne asserts that he has a single (undisclosed) client paying him at that rate to argue a case in the United States Supreme Court. One client does not determine a fair hourly rate. There is no disclosure as to whether that client would be prepared to pay him at that rate for an unlimited number of hours, or just a discrete number of hours. Moreover, work in the Supreme Court is not an equivalency for over 8,000 hours of work done in this case, the majority of which hours were spent on mundane tasks. Mr. Neuborne does not disclose his salary as a law professor; nor does he quibble with the $150,000 annual rate for 1,600 hours suggested by the Class. Nor does he assert that he bears any overhead -- such as the overhead of a New York City lawyer with multiple clients all paying his firm an hourly rate of $700.

Several of Mr. Neuborne's friends filed declarations supporting a hypothetical rate of $700 per hour if Mr. Neuborne were in private practice. But he is a law school professor. They omit mentioning that $700 is the rate per hour the **law firm** receives for a lawyer billing at $700 per hour, **not** the lawyer. Hourly rates are high in New York City in part because the cost of practicing is high there. If compensation is awarded on the Fee Application, Mr. Neuborne will receive

100% of his hourly rate since his overhead is covered by his law school. Moreover, courts do not look to hypothetical rates, they look to real rates paid in the marketplace to the applying lawyer – and then compare that rate to comparable rates in the marketplace. Otherwise, all lawyers could contend they deserve higher rates that they actually receive – so long as their friends submit declarations in support thereof. It is worthy to note that David Boies was engaged by Judge Shirley Kram to represent her in a mandamus action in the Court of Appeals in a Holocaust matter in 2001 at a rate of $125 per hour.

Mr. Neuborne tries to justify his hourly rate on the basis that he is brilliant, as several of his friends proclaimed. Whether he is or not is irrelevant. The question is whether brilliance was evident in all – or any -- of the 8,000 hours. Experience suggests that the practice of litigation is 1% creativity and 99% hard work. That would apply to the post-settlement work in this litigation. While there was discord among class members as to aspects of the settlement, there was little chance the $1.25 billion settlement would not be approved. Certainly there was no brilliance demonstrated in misleading the Court of Appeals that the German Foundation Settlement may cover all Looted Assets Subclass claimants (*see In re Holocaust Victim Assets Litigation*, 2001 WL 868507, *2 (2d Cir. 2001) when, in fact, that settlement expressly excluded any claim that could have been made during the preceding 55 years; or in advocating a *cy pres* distribution which eliminated hundreds of thousands of looted assets subclass members whose claims were released in the settlement.

Finally, the $700 rate is excessive considering the availability of other lawyers willing to work on a *pro bono* basis. Thus, if half or more of the 8,000 hours of work could have been performed for free for the Class, what justification is there for paying the highest rate for all 8,000 hours.

B. Mr. Neuborne Inflates His Enhancements to the Settlement

Mr. Neuborne claims that he added $56 million of value to the $1.25 billion settlement in numerous ways. First, he credits himself for federal legislation making payments under the settlement free of United States income taxes. While the result was worthy, the credit goes to Congress, not Mr. Neuborne.

Second, Mr. Neuborne claims he obtained "additional" interest of $5 million as a result of litigation before Judge Block. This is not so. When Mr. Neuborne negotiated Amendment No. 1 to the Settlement Agreement, he mistakenly reduced the interest rate being earned on the settlement funds being held by the defendant banks. When Mr. Neuborne discovered this, he requested the assistance of the undersigned and others to confirm the original intent of the Settlement Agreement regarding interest. With declarations provided by the undersigned and others, Mr. Neuborne prevailed in restoring the original interest rate.

Third, Mr. Neuborne takes credit for negotiating the insurance amendment to the Settlement Agreement. This is a true enhancement that the undersigned negotiated with Mr. Neuborne that provided for certain Swiss insurance companies to match payments to insurance claimants. While the agreement provided for matching up to $50 million, there was no expectation insurance payouts would approach that level. In fact, I understand that only $300,000 has been paid out, making the enhancement worth $150,000.

Finally, Mr. Neuborne properly takes credit for negotiating Amendment No. 2 to the Settlement Agreement. This provided for the final installment payment of $334 million to be paid a year earlier, producing approximately a $20 million enhancement.

C. The Time Charged Is Excessive

1. Mr. Neuborne Has Not Explained the Anomalies in His Records

The Class pointed out several anomalies – both on a micro and macro level -- in Mr. Neuborne's time records in its earlier submission. Since Mr. Neuborne knew since January 1999 he would be filing a fee application based on his hours worked, he understood the importance of keeping accurate and detailed records. His explanation for billing 24 or more hours in a single day (i.e. he says the billing was for a task that really covered two days) is not credible when in the second day he is also billing 16 or more hours. Mr. Neuborne's time records provide a paucity of information to support long stretches of time. In addition, the Class agrees with the anomalies identified in the Opposition of Schaecter *et al.*

On a macro level, the Class questioned how Mr. Neuborne could have devoted 1,800 billable hours to work on this matter in the year 2000 when he was fully employed as a law school professor (assume 1600 hours) and also devoted 867 hours to the German Holocaust litigation and settlement (as his counsel informs the Class). While it may be mathematically possible for a lawyer to work 4,267 hours in a year -- which equates to 11.69 hours for every day of the year – it is highly unlikely. If accurate, the quality of the hours billed becomes highly suspect.

In short, it is Mr. Neuborne's burden to establish the accuracy of his records, and the Class believes the Court must closely scrutinize the records.

2. Mr. Neuborne Failed to Delegate Tasks to Others

The Manual for Complex Litigation approves the designation of lead counsel and requires that counsel "act fairly, efficiently and economically in the interests of all parties and parties' counsel." Manual (Fourth) at §10.221. It was not efficient and economical for the Class to have Mr. Neuborne monopolize all the work when other counsel were willing to work *pro bono*. Nor was it necessary that all the work be performed at Mr. Neuborne's experience level. Mr. Neuborne asserts that $15 per hour law students could not do the research he was doing.

Whether or not that is true in part or in whole, he does not dispute that lawyers at the $200 per hour associate level could; or partners at a $350 level could. The Class should not be charged at a higher rate for work – if done on a commercial basis – that should have been billed at a lower rate.

The fact is that over a seven year period Mr. Neuborne never called a meeting of all Settlement Class Counsel. Nor did he periodically inform all Settlement Class Counsel of developments in the litigation. The rationale for monopolizing the work – and not sharing information – is that he wanted only his views to be heard in speaking for the Class. It is not a sufficient answer to assert that other counsel did not share his point of view regarding allocation. Pre-settlement, when there were two lead counsel and an executive committee of ten, the Class benefited from a rich diversity of talent and views. Post-settlement, Mr. Neuborne attacked Settlement Class Counsel with views different from his. Hence, the lack of delegation was intentional and should not be rewarded.

3. Some of Mr. Neuborne's Time Was Devoted to Representing the Court

A portion of Mr. Neuborne's time was devoted to upholding this Court's rulings without regard to whether those rulings benefited the Class as a whole. Mr. Neuborne's time records show meetings and phone conferences with the Court and Special Master which excluded other Settlement Class Counsel and defense counsel. It is a fact in this litigation that a vast number of class members who released looted asset claims will receive no compensation whatsoever on a claims made or *cy pres* basis as a result of rulings by this Court. In zealously supporting those rulings in the Court of Appeals Mr. Neuborne was acting as counsel for the Court, not the Class as a whole. Accordingly, the Court should reward Mr. Neuborne for that work from a fund other than the Settlement Fund.

IV. Conclusion

The Class does not dispute the right of class counsel to be paid at a fair rate for services performed to benefit the Class in post-settlement matters. Nor does it dispute that some of the work performed by Mr. Neuborne benefited the Class as a whole. However, Mr. Neuborne was widely understood and credited with performing services *pro bono* as Settlement Lead Counsel. No one forced him to make his assertions. There was a duty of disclosure which was not honored if indeed he had an agreement with the Court for compensation.

Should the Court decide it should compensate Mr. Neuborne, then it must carefully scrutinize the anomalies in his records and decide on a fair hourly rate which reflects commercial reality and the nature of the work performed; while excluding time for work that could have been done by others on a *pro bono* basis or others at lesser hourly rates, and time devoted to the representation of the Court.

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Respectfully submitted,

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